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No. 387 Misc.

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In the

Supreme Court of the United States

October Term, 1965.

UNITED STATES OF AMERICA, ex rel. LLOYD ELDON MILLER, JR.,

Petitioner,

vs.

FRANK J. PATE, Warden of the Illinois State Penitentiary, Joliet, Illinois,

Respondent.

(Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.)

REPLY BRIEF OF PETITIONER.

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Petitioner need say but a few words in reply. It is noteworthy that respondent concurs with us in recognizing the importance of the case. Twice, in requesting extensions of time for filing his brief in opposition, respondent stated, "We deem the issues raised in this capital case to be of significance . . ." There is solid ground for this opinion, for the decision below is contrary to the holdings of this Court and out of harmony with the decision of other circuits. Any one of the constitutional breaches

asserted by petitioner would be sufficient for this Court to grant review. Taken collectively, they present a litany of wrong, not often matched in a single case. That they occurred in a capital case is appalling. Respondent's answer to the petition does not challenge, but admits, our recital of facts. Thus, rather than persuading acceptance of the judgment below, the answer floodlights the wrongs which that judgment sanctions.

1. *The hair.* Respondent informs us (Resp. 6) that the hair was "not material evidence in the case." The hair was found in the body of a child just sexually assaulted. It was found upon scientific examination not to match that of petitioner charged with the crime. (See Pet. 5-7 and 15-18 for details.) We have shown that there is no foundation for the speculations of the court below that the hair was not connected with the assailant. (Pet. 17) This evidence was more than material. Since it stood unexplained by the prosecution, it was exculpatory. Hence, its suppression by the prosecution was a clear constitutional infringement, denounced by this Court in *Brady*. (Pet. 15) Respondent takes out of context two words from *Brady* (Resp. 4, 7-8) as excuse for suppression of the hair. It claims suppression justified because it was not a suppression "upon request." The language arose from the facts of the case. In *Brady*, upon defense request, the prosecution revealed several statements of Boblit, a co-conspirator. What it hid was the crucial one in which Boblit admitted *he* fired the shot, not Brady. (373 U.S. at 84) But the rule urged by respondent is that suppression is proper unless the accused requests the evidence suppressed. The suggestion borders on fatuity. There was a request, moreover, by petitioner well in advance of trial for a scientific examination of the physical evidence by his expert. This motion was opposed by

the prosecution, denied by the trial court, the denial upheld by the Supreme Court of Illinois. (Pet. 6) What further "request" could petitioner have made?

In *U.S. ex rel Meers* v. *Wilkins* (Pet. 16), moreover, the Second Circuit held that *Brady* required no request where as here the suppressed evidence was crucial to the defense but could not be discovered by it. (326 F. 2d at 137-140)

A recent decision of the Ohio Supreme Court is to the same effect. *McMullen* v. *Maxwell*, 3 Ohio St. 2d 160, 209 N.E. 2d 449 (July 21, 1965). There the prosecution contended the murder weapon was a gun belonging to a co-conspirator. Yet it knew from ballistics tests that the murder weapon was another gun in its possession, no way connected to defendant. Suppression of these facts from the defense caused the conviction to be set aside on habeas corpus for deprivation of federal due process.

The authorities were not merely silent about the hair. The hair was actually used to induce confession by falsely telling petitioner that it was his. This we think shocking. Similar deceptions met sure condemnation by this court in *Spano* and *Leyra* (Pet. 18). If the police already knew the hair was not petitioner's when they said it was, their statement was a lie; if they had not yet checked so crucial a point in a capital case, the statement merits an equally harsh term. If the 1959 Fifth Circuit *Young* decision permitted such trickery, it must yield to *Spano* and *Leyra*. So must *Lewis* (correct citation, 74 F. 2d 173 (1934)) (See Resp. 17) We have already answered the contention that petitioner did not believe the hair to be his (Pet. 18).

Having deceived petitioner on the hair, the prosecution sought to deceive his counsel. On motion, counsel was permitted once to look at the physical evidence. (R. 191-2) He was shown the hair (R. 193) but not the exonerating scientific report.

2. *The shorts.* Respondent claims suppression of the paint on the shorts was not material. (Resp. 6) At the trial, ownership of the shorts was a key issue: were they petitioner's abandoned in haste—or a discarded paint rag? (See Pet. 7-9 and 18-20) By suppressing evidence of the paint, the prosecution avoided the necessity for explaining its presence. Respondent (p. 6-7) makes no answer to this contention we advanced at Pet. p. 19. Moreover, when the jury were shown the shorts, they were led to believe they were seeing the dried blood of the child when they actually were seeing dried paint. What could be more inflammatory and prejudicial? Or a greater falsehood told by silence?

The discrepancies between Litterly's testimony and his report (Resp. 6-7) were covered in detail in our main brief. (Pet. 8, 20-21)

3. *Betty Baldwin Curry.* Respondent now admits that Betty Baldwin Curry lied to the police on two occasions prior to her appearance on the stand. (Resp. 9) These events are related at Pet. 9-11 and 21-22. But, urges respondent, no matter. Regarding her testimony the prosecution believed her and therefore she could give evidence to send petitioner to his death. Were not judge and jury entitled to know what the prosecution knew about her fabrications? That the petitioner was able to impeach Betty Baldwin Curry in some respects (Resp. 9) does not cure the wrong. The *Taylor* quotation (Resp. 9) makes our point. There, the prosecution revealed the full truth regarding the witness; here it concealed it.

Even on the stand Mrs. Curry could not avoid fabrication. An acquaintance of five weeks became two years. Respondent's answer on this point (Resp: 10-11) demonstrates that at the trial when the truth was not wholly

suppressed (as in the case of the hair and the paint) it was distorted: how long Mrs. Curry had known petitioner was not a mere preliminary. It was designed to impress upon the jury that petitioner had known Mrs. Curry so long that he would reveal a crime to her. Therefore, the crucial point was how long Mrs. Curry had known petitioner *before* November 26, 1955. The time subsequent was irrelevant. Even on respondent's own terms her testimony was a lie, for Mrs. Curry doubled (from eleven months to two years) the term of acquaintance.

4. *Mrs. Alice Baxter.* The testimony of Mrs. Baxter was crucial to petitioner. (See Pet. 11-13 and 25-26; Resp. 12-13.) Petitioner did exactly what respondent now says he should have done—(Resp. 12) ask to have her called as the court's witness. (See Pet. 12) He was not allowed to do so. Respondent recognizes that Illinois has very little in the way of criminal discovery procedures (Resp. 13). This was precisely the reason the prosecution should not have impeded defense counsel when he sought to interview Mrs. Baxter who was a key witness.

5. *Deprivation of counsel.* It is undenied that petitioner, while held incommunicado, asked several times to see his family. (Pet. 29) Clearly the purpose was to obtain counsel. Petitioner's parents were first allowed to see him on December 1 (Abst. 333), the day following his confession on the night of November 30-December 1. They at once retained Mr. William Malmgren to represent their son and Mr. Malmgren saw petitioner that very day, December 1 (Tr. 939). Thus, despite respondent's argument (Resp. 14-16) the case falls squarely within *Haynes* and *Escobedo* (Pet. 28-29).

6. *The false argument to the jury.* It is a fact of record testified to by a prosecution witness that the shorts

and jacket mentioned in the confession were in police custody *before* the confession. (Pet. 29) Respondent can not dismiss as inconsequential (Resp. 18) whether the garments were found before or after the confession. The difference was vital and respondent knows it. The prosecution argued to the jury that the confession was corroborated because it led to the finding of the garments. This just was not so at all.

Petitioner has been gravely wronged at each step of the proceedings against him. We ask that certiorari issue.

Respectfully submitted,

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